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SUPREME COURT, U.S.

CASE NO. 81-6908

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

ELWOOD BARCLAY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

COMES now respondent, the State of Florida, by and through the undersigned counsel, and hereby respectfully requests leave to file a supplemental brief of respondent. In support of said motion, the State of Florida would show:

I.

Respondent earlier filed Brief in Opposition to petitioner's prayer for writ of certiorari. Among the points presented by petitioner in support of his prayer for relief was the allegation that nonstatutory aggravating factors were

considered in the imposition of his sentence of death. The State of Florida responded to that allegation stating that a substantial federal question was not presented for several reasons.

II.

Recent developments in the Eleventh Circuit, specifically the decision of Proffitt v. Wainwright, No. 80-5977, _____F.2d_____(11th Cir. 1982), have changed the status of respondent's position in this cause. In Proffitt v. Wainwright, a rule disallowing the use of nonstatutory aggravating circumstances under any factual setting is announced. That holding is directly in opposition to the rule announced by the Florida Supreme Court in Brown v. State, 381 So.2d 690 (Fla. 1980); Elledge v. State, 346 So.2d 998 (Fla. 1977); Hargrave v. State, 366 So.2d 1 (Fla. 1979); Sireci v. State, 399 So.2d 964 (Fla. 1981).

III.

Direct conflict in the decisional law between the highest court of a state and any of the circuit courts of appeals provides a valid reason for the issuance of a writ of certiorari by this Court.

WHEREFORE, it appears that a substantial change has occurred in the position earlier taken by the State of Florida in the above-styled cause on the issue of the existence

of a substantial federal question. It is respondent's position that the writ should issue for the purpose of determining the validity of the use of nonstatutory aggravating circumstances previously approved by this Court in Proffitt v. Fla., 428 U.S. 506 (1976). It is for this reason that respondent requests leave to file a supplemental brief.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Motion to Mr. Bartley Kenneth Vickers, of Vickers & Rohan, P.A., Attorneys at Law, 437 East Monroe St., Jacksonville, Florida 32202, by U.S. Mail, this 24th day of September 1982.

Wallace E. Allbritton

WALLACE E. ALLBRITTON
Assistant Attorney General

of Counsel

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SUPPLEMENTAL BRIEF OF RESPONDENT

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ARGUMENT

ISSUE

WHETHER THE FLORIDA SUPREME COURT PROPERLY UPHELD THE IMPOSITION OF THE DEATH PENALTY IN THE FACE OF AN IMPROPER AGGRAVATING CIRCUMSTANCE.

Respondent, the State of Florida, earlier supplied this Court with a brief in opposition to petitioner's prayer for certiorari relief. The State of Florida now believes that petitioner's issue does present a substantial federal question in that the Florida Supreme Court, on numerous occasions, has held that the presence of an improper aggravating circumstance in sentencing does not necessarily cause a violation of the constitutional rights of the defendant. The Circuit Court of Appeals, Eleventh Circuit, recently dealt with the following issue in Proffitt v. Wainwright, ___F.2d____(11th Cir. 1982), (No. 80-5997, decided September 10, 1982):

> whether the construction of the eighth statutory aggravating factor [whether murder was committed in a heinous atrocious and cruel manner] evinced by the trial court's application of it to the facts of this case comports with the eighth amendment requirement that death sentences be based on clear, detailed, and rationally reviewable standards.

Slip op. at 2733.

The Eleventh Circuit substituted its judgment for that of the trial judge and determined that the eighth statutory

aggravating circumstance - heinous, atrocious, or cruel - was not present. Further, the court held that the use of a non-statutory aggravating circumstance--appellant has the propensity to commit the crime for which he was convicted and is a danger and menace to society--to be constitutionally impermissible.

Notwithstanding this Court's specific holding in Proffitt v. Florida, 428 U.S. 242 (1976), that non-statutory aggravating factors do not necessarily make the sentence unconstitutional, the Eleventh Circuit held:

> In considering appellant's "propensity to commit [murder]" and the danger he posed to society, the trial court transcended the list of aggravating factors set forth in the Florida statute and substituted its own judgment of what circumstances justified capital punishment for that of the Florida Legislature. In so doing, the trial judge not only committed error under the state law, see Brown v. State, 381 So.2d 690, 696 (Fla. 1980); Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977); he also exceeded the federal constitutional limitations imposed by Furman on capital sentencing by increasing the risk that the death penalty would be imposed in an arbitrary and capricious manner.

This must be viewed as nothing less than an outright repudiation of this Court's holding in Proffitt v. Florida, supra. The Proffitt opinion sets forth the aggravating circumstances found by the trial judge as follows:

> (1) The murder was premeditated and occurred in the course of a felony (burglary); (2) the petitioner has a propensity to commit murder; (3) the murder was especially heinous, atrocious and cruel; and (4) the petitioner knowingly,

> through his intentional act created a great risk of serious bodily harm and death to many persons.

At 246. This is particularly interesting because of the aggravating circumstance of "propensity to commit murder" is not now and never has been a statutory aggravating circumstance under the Florida death penalty statute [§ 921.141, F.S. (1975)]. See Proffitt, 428 U.S. 248, n. 6, which sets forth the statutory aggravating circumstances in effect at the time Proffitt was decided. The unmistakable conclusion is that this Court approved the use of a nonstatutory aggravating circumstance when used along with other statutory aggravating circumstances for the purpose of supporting the imposition of the death penalty. This is diametrically opposed to the holding of the Eleventh Circuit in Proffitt v. Wainwright, supra.

In Elledge v. State, 346 So.2d 998 (Fla. 1977), the Florida Supreme Court was confronted with a situation where it was necessary to determine whether the use of a nonstatutory aggravating circumstance was constitutionally permissible. The court then engaged in an exhaustive analysis of Proffitt v. Florida, concluding as follows:

> It appears that the United States Supreme Court does not fault a death sentence predicated in part upon nonstatutory aggravating circumstances where are are no mitigating circumstances. The absence of mitigating circumstances becomes important, because, so long as there are some statutory aggravating circumstances, there is no danger that nonstatutory circumstances have served to overcome the

> mitigating circumstances in the weighing process which is dictated by our statute. [Emphasis ours.]

Elledge at 1002, 1003. Consequently, under the reasoned analysis of Proffitt by the Florida Supreme Court, the existence of the statutory aggravating circumstance and the absence of mitigating circumstances renders unimportant the existence of nonstatutory aggravating circumstances. In petitioner's trial, the trial judge found that there were no mitigating circumstances. Thus, the Eleventh Circuit's decision in Proffitt v. Wainwright, supra, not only is contrary to the law of Florida, but is also contrary to this Court's holding in Proffitt.

As recently as July 15, 1982, the Florida Supreme Court in Ferguson v. State, 417 So.2d 639 (Fla. 1982), reaffirmed the principle that nonstatutory aggravating circumstances do not necessarily invalidate the sentence when no mitigating circumstances are found.

> Our negation of two of the aggravating circumstances found by the trial court would not change the result of this case in the absence of mitigating circumstances for there remain four valid aggravating circumstances. In such cases, reversal of the death sentence would not necessarily be required, as any error that occurred in the consideration of the two inapplicable aggravating circumstances was harmless. See Shriner v. State, 386 So.2d 525 (Fla. 1980), cert.denied, 449 U.S. 1103, 101 S.Ct. 899, 66 L.Ed.2d 289 (1981); Dobbert v. State, 375 So.2d 1069 (Fla. 1979), cert.denied, 447 U.S. 912, 101 S.Ct. 300, 64 L.Ed.2d 862 (1980); Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert.denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176

(1979); and Elledge v. State, 346 So.2d 998 (Fla. 1977).

At 646.

This issue should be decided by this Court. The courts of the State of Florida, relying on this Court's decision in Proffitt v. Florida, supra, are in direct conflict with the above cited decision of the Eleventh Circuit. The 9,000,000 citizens of Florida have the right to know which precedent is controlling. The failure to resolve this intolerable conflict will cause a significant number of cases to be upheld under the Florida standard, only to be reversed in the federal system.

CONCLUSION

Therefore, respondent feels that a substantial federal question has been presented by petitioner and therefore certiorari review should be granted by this Court.

Respectfully submitted,

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WALLACE E. ALLBRITTON
Assistant Attorney General

of Counsel